

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

CAROL and JERRY MUSZIK,

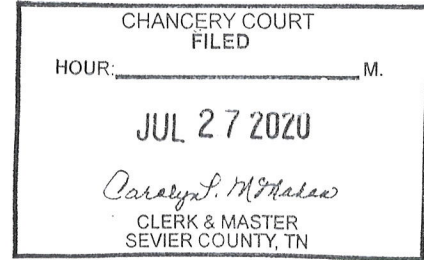
Plaintiffs,

v.

ACUITY, A MUTUAL INSURANCE
COMPANY,

Defendant.

Case No.: 20-7-133



COMPLAINT

Come the plaintiffs and bring this action against the defendant for its failure to pay under the terms of a commercial insurance policy of which the plaintiffs are intended third-party beneficiaries. For their causes of action, the plaintiffs state as follows:

The Parties

1. The plaintiffs, Carol and Jerry Muszik (the "Musziks" or "Plaintiffs"), are citizens of the State of Tennessee and residents of Sevier County, Tennessee. The Musziks are the owners of a parcel of real property located at 560 Greystone Heights Road in Gatlinburg, Tennessee (the "Property"). Gatlinburg, Tennessee is contiguous to the Smoky Mountains National Park.

2. Plaintiffs hired or caused the hiring of an individual named Rick Angel ("Angel") to perform certain construction work on the Property. The defendant, Acuity, A Mutual Insurance Company (the "Insurance Company" or "Defendant"), is a foreign insurance company located at 2800 S Taylor Dr, Sheboygan, WI 53081. Upon information and belief, Defendant has taken all steps necessary to offer insurance in the State of Tennessee, including the appointment of the Commissioner of the Department of Commerce and Insurance (the "Commissioner") as its

attorney for receipt of legal process. Pursuant to Tenn. Code Ann. § 56-2-504(a), Defendant may be served with process through service upon the Commissioner.

3. On or about November 28, 2017, Defendant agreed to provide a contract of insurance to insure Angel for his work, including but not limited to work on the Property. Pursuant to this agreement, Defendant issued an insurance policy (the “Policy”). Defendant is in possession of the Policy.

Jurisdiction and Venue

4. Pursuant to Tenn. Code Ann. § 20-2-214(a), this Court has personal jurisdiction over Defendant because Defendant has transacted business in the State of Tennessee and has issued policies of insurance covering persons performing work in the State of Tennessee, including but not limited to Angel.

5. Pursuant to Tenn. Code Ann. § 20-4-101, venue is proper in Sevier County, Tennessee because the cause of action arose in Sevier County.

Factual Allegations

6. On November 28, 2016, the house on the Property was completely destroyed by a massive wildfire which ripped through Sevier County and Gatlinburg.

7. In the fall of 2017, Plaintiffs began construction of a new, high-quality home to be built on the Property. Plaintiffs engaged Angel to lay the foundation for the house, to install the elevator shaft, to build a retaining wall, and to perform other masonry services.

8. Subsequent to their hiring him, Angel worked on the site between December 1, 2017, and January 31, 2018.

9. During this period of time, the Policy was in full force and effect.

10. Based upon their own observations of the conditions of the house and based upon the evaluation by others, Plaintiffs identified extensive problems with Angel's work. The deficient and defective work by Angel, the insured of Defendant, caused and contributed to other damages to and on the Property.

11. After becoming aware of the problems, Carol Muszik notified Defendant and filed a claim with Defendant.

12. Defendant denied the claim and, despite the terms of the Policy, elected not to provide legal representation of its insured.

13. On or about February 20, 2019, Plaintiffs filed suit against Angel.

14. Defendant received timely notice of the lawsuit.

15. Despite receiving timely notice of the lawsuit, Defendant elected not to defend its insured.

16. Angel did not file an answer or other response to the lawsuit, and Defendant did not provide counsel or otherwise defend the lawsuit on Angel's behalf.

17. On February 14, 2020, upon motion of Plaintiffs, the trial court entered an order of default against Angel.

18. On April 15, 2020, upon the hearing of proof of Plaintiffs' damages, the trial court entered a Final Judgment against Angel in the amount of Ninety-Six Thousand, Seven Hundred Seventeen Dollars and Twelve Cents (\$96,717.12). A true and correct copy of the Final Judgment is attached hereto as Exhibit A.

19. As a result of the entry of the judgment, Angel became legally obligated to pay the claim.

20. Angel did not appeal the judgment. Therefore, it became final and non-appealable as of May 16, 2020.

21. Pursuant to the terms of the Policy, Defendant became legally obligated to pay the judgment.

22. Upon the entry of judgment against Angel, Plaintiffs no longer had a remote interest in the contract of insurance but had a real interest in the contract, which was enforceable directly against Defendant. Pursuant to Tennessee law, Plaintiffs became the intended, third-party beneficiaries of the contract.

23. By letter dated June 8, 2020, Plaintiffs, by counsel, made demand upon Defendant to comply with its contractual obligations.

24. Despite this demand, Defendant has failed and refused to pay.

CAUSES OF ACTION

Count I – Breach of Contract

25. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs one (1) through twenty-four (24) above.

26. The Policy is a valid, enforceable agreement.

27. As of the period December 1, 2017, to January 31, 2018, the Policy was in full force and effect.

28. On April 15, 2020, Plaintiffs obtained a Final Judgment against Defendant's insured, Rick Angel.

29. Upon entry of the Final Judgment, Plaintiffs obtained a real interest in the contract of insurance and became the intended third-party beneficiaries of the Policy.

30. Pursuant to the terms of the Policy, Defendant had an obligation to pay all amounts that its insured became legally obligated to pay.

31. Defendant has failed and refused to meet its contractual obligations under the Policy.

32. Defendant's failure of performance constitutes a material breach of the contract.

33. As a result of Defendant's breach of contract, Plaintiffs have suffered damages.

34. Because Plaintiffs are the intended third-party beneficiaries of the Policy, they are entitled to bring an action for its breach.

Count II – Declaratory Judgment

35. Plaintiffs reallege and incorporate by reference the factual allegations contained in paragraphs one (1) through twenty-four (24) above.

36. In the alternative to Count I, Plaintiffs seek a declaration regarding the respective rights and obligations of the parties pursuant to Tenn. Code Ann. § 29-14-102.

37. In particular, Plaintiffs seek a declaration that Defendant is obligated to pay the judgment entered against its insured, Rick Angel.

WHEREFORE, Carol and Jerry Muszik request the Court to:

- a) Cause process to issue to Acuity Insurance Company requiring it to answer within the time required by law;
- b) Enter judgment against Acuity Insurance Company for breach of the contract of insurance in such amount as the proof will show;
- c) In the alternative, declare that Acuity Insurance Company is obligated to pay the judgment entered against its insured, Rick Angel;
- d) Enter judgment against Defendant for prejudgment interest and all additional costs, expenses, and fees permitted under the Policy;
- e) Tax all costs to Defendant; and

- f) Grant such other and further relief to which Plaintiffs may be entitled.

Respectfully submitted,



Michael S. Kelley (BPR #14378)
Eli Lovingfoss (BPR #037586)
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elijah@kmfpc.com

Attorneys for Plaintiffs

COST BOND

We the undersigned hereby acknowledge ourselves as surety for all costs in this cause in accordance with Tenn. Code Ann. § 20-12-120.

KENNERLY, MONTGOMERY & FINLEY, P.C.

By: _____



Michael S. Kelley

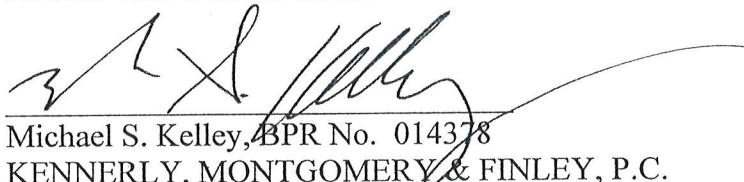
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3. Pursuant to Tenn. R. Civ. Pro. 58(3), the Clerk is requested and directed to certify this Final Judgment and send a copy to the defendant at his address below and a copy to the plaintiffs, in care of their attorney, Michael S. Kelley.

ENTER THIS THE 15 DAY OF APRIL, 2020.


David R. Duggan, Judge

APPROVED FOR ENTRY:


Michael S. Kelley, BPR No. 014378
KENNERLY, MONTGOMERY & FINLEY, P.C.

Fourth Floor, Bank of American Center
550 Main Street
Knoxville, TN 37902
(865) 546-7311

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true, correct and exact copy of the foregoing has, this day and date, been mailed to the persons listed below at the addresses shown, by depositing same in the U.S. Mail, first class postage prepaid.

Michael Kelley
Rick Angel

This 15 Day of April, 2020.

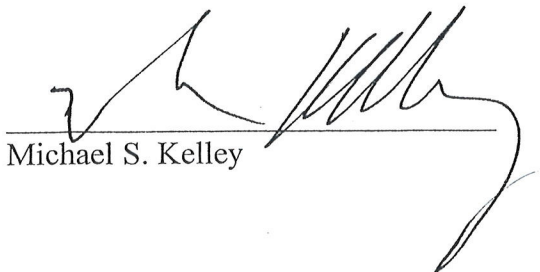
TOM HATCHER, CIRCUIT COURT CLERK

BY D. Weger

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Proposed Final Judgment has been served on the following by United States Mail, first class, postage prepaid, this 15 day of April, 2020:

RICK ANGEL
234 Union Grove Road
Friendsville, TN 37737


Michael S. Kelley